STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. ARO-21-312

DENNIS WINCHESTER,

Petitioner - Appellant,

v.

STATE OF MAINE,

Respondent - Appellee.

APPEAL FROM A JUDGMENT OF THE AROOSTOOK COUNTY UNIFIED CRIMINAL DOCKET

APPELLANT'S BRIEF

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Petitioner-Appellant Dennis Winchester respectfully submits this Brief in support of the Appellant's appeal from a judgment of the Aroostook County Unified Criminal Docket.

Introduction

This is an appeal from the denials of Petitioner Winchester's six petitions for post-conviction review. In this appeal Winchester asserts two claims of ineffective assistance of counsel that the PCR court erroneously rejected: (1) that his various trial attorneys failed to move to dismiss the charges against him for the violations of his speedy trial rights, and (2) that his appellate attorney failed to assert on appeal Winchester's speedy trial violations claim.

Statement of Facts and Procedural History

In 2014 and 2015 the State initiated multiple prosecutions against Winchester for various alleged burglaries and thefts. In one case (CARSC-CR-2014-147), Winchester was convicted at trial in 2015. On February 18, 2015, in that case, Winchester was sentenced to five (5) years in prison with all but three (3) years suspended. Winchester's appeal from that conviction was denied by this Court in a Memorandum Decision. Mem 15-82.

In or about February, 2015, Winchester started serving the sentence in CR-14-147. Throughout the time of the various subsequent proceedings Winchester remained incarcerated.

Later, Winchester was prosecuted on six other charges, docketed under numbers 14-267, 14-515, 14-545, 14-547, 15-003, and 15-067. A. 92, 103, 114, 123, 132, 144. In 14-545, in November, 2017, Winchester was convicted at a trial. A. 25, 120. As to all the others, in December, 2017, he entered conditional pleas of no contest (agreed with the State), preserving for appeal the issues of lack of speedy trial, failure to preserve potentially exculpatory evidence, and lack of particularity in various search warrants. A. 26. At the time of Winchester's November, 2017 trial and December, 2017 pleas, many of his various cases had been ***pending for more than three years*** (certainly, a "presumptively prejudicial" delay). For example, in CR-14-267, the Complaint was filed on 06/03/2014, and the Indictment was filed on 07/11/2014, but Winchester's no contest plea was not entered until 12/06/2017. A. 92, 101. Under these circumstances (i.e., a criminal case pending for more than three years), the complete failure of defense counsel to file any speedy trial motions "undermines confidence in the outcome of the case." *Theriault v. State*, 2015 ME 137, ¶ 19, 125 A.3d 1163.

Winchester was then (in December, 2017) sentenced to further terms of imprisonment and appealed his convictions to this Court, which affirmed the convictions in a decision dated October 18, 2018. *State v. Winchester*, 2018 ME 142, 195 A.3d 506. Notably, in that appeal, this Court addressed and rejected Winchester's exculpatory evidence claim and search warrant claim, but

Winchester did not raise, and this Court did not address, any speedy trial claim, although the speedy trial claim was briefly mentioned in footnote 4 of the decision. *Id.* ¶12 n. 4, 195 A.3d 506, 509 n. 4. That footnote stated in part, "Winchester did not present any developed argument concerning his lack of a speedy trial to the trial court or in his briefing to this Court. Thus, Winchester is deemed to have abandoned this issue on appeal."

After this Court affirmed Winchester's convictions, Winchester timely filed six petitions for post-conviction review, all alleging various claims of ineffective assistance of counsel. A. 44, 52, 60, 68, 76, 84.

In June, 2021, the PCR court held an evidentiary hearing on the petitions. 06-08-2021 Hearing Transcript. In July, 2021, the court denied all of the petitions in an extensive, thorough, and careful twenty-five page decision. A. 19 (07/22/2021 Decision). In its decision, the PCR court noted that "no motions for a speedy trial had been filed in any of the dockets," A. 23, but Winchester himself had raised a speedy trial question in April, 2015, A. 22-23, 153.

In his April, 2015 letter to the Clerk, A. 153, Winchester stated, "Jon Plourde was told by me to file a motion for speedy trial . . . . He assured me that he has done so. Has Jon Plourde in fact filed these motions?" Winchester's April 2015 letter concerning his speedy trial rights may have been a little "too early" for at least some of his cases (for example, the Indictment in 15-067 was only filed in

March, 2015, A. 144), but many of his cases arose out of 2013 and 2014 events and had, as of April 2015, already been pending for many months. A. 92, 103, 123. At the very least, Winchester's April 2015 letter put his attorneys on notice that he wanted to vigorously assert his speedy trial rights, something he spoke with his attorneys about repeatedly. 06/08/2021 Evidentiary Hearing at 13-19.

Winchester spoke with his then trial attorney (Neil Prendergast, appointed on April 28, 2015, A. 95) about his April 2015 letter; the attorney advised that the court had no record of any speedy trial motion; thereafter the attorney took no further action on the matter. 06/08/2021 Evidentiary Hearing at 13-15. Attorney Tebbetts raised the speedy trial issue at the outset of Winchester's November, 2017 trial, 06/08/2021 Evidentiary Hearing at 18-19.

The PCR court's decision addressed and rejected many claims asserted by Winchester. In this appeal, Winchester challenges only the PCR court's denial of his speedy trial claims.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the UCD Court erred to deny the Petitioner's PCR claim that his trial counsels' failures to file speedy trial motions in his greatly delayed criminal cases were ineffective assistance of counsel.

2. Whether the UCD Court erred to deny the Petitioner's PCR claim that his

appellate counsel's failure to assert in his appeal a speedy trial claim was ineffective assistance of counsel.

3. Whether the Petitioner had any valid speedy trial claim under the Sixth Amendment to the U.S. Constitution.

ARGUMENT

POINT I

The Petitioner's UCD Court Attorneys Should Have Asserted The Petitioner's Speedy Trial Violation Claims In the UCD Court Proceedings

A. UCD and PCR Proceedings

Most of Winchester's various cases dragged on for a long time. The first one to go to trial went to trial relatively quickly, but the rest were greatly delayed. Winchester at various times specifically asked his attorneys to file speedy trial motions. 06/08/2021 Evidentiary Hearing at 11-20. He asked his appellate attorney to make the speedy trial claim a part of his appeal. *Id.* at 18-20. None of his attorneys took the actions requested (except that at the outset of his November, 2017 trial Winchester's trial attorney ineffectively raised the issue, 06/08/2021 Evidentiary Hearing at 18-19). In April, 2015, Winchester personally wrote to the Court, and spoke with his then trial attorney (Mr. Prendergast), and inquired about any speedy trial motions that had been filed. *Id*. at 12-14.

The PCR court acknowledged all this speedy-trial-related evidence but denied Winchester's claim anyway after itemizing the various procedural developments in Winchester's cases and concluding that all the delays were justified or excused. A. 38-43. This was error and an improper retroactive justification of what had been done or not done. The PCR court wrongly

substituted its limited PCR-focused judgment about Winchester's speedy trial claims (or probable claims) for what should have been the UCD court's *de novo* assessment of properly asserted and litigated claims. Winchester's trial attorneys should have filed one or more motions for speedy trial dismissals, and if they had done so, those motions would have been litigated and decided *on the merits on a fully developed record*. Winchester was effectively denied his fair opportunities to make and pursue his speedy trial claims in the UCD court. That litigation would have included, for example, assessments of whether some of his pending cases should have been treated differently than the others. For example, the Indictment in 14-267 was filed on 07/14/2014, A. 92, but the Indictment in 15-067 (which actually charged 2013 crimes) was only filed on 03/06/2015, A. 144. Instead, the PCR court just lumped all six cases together and excused the multiple extended delays. That was error.

B. Maine Speedy Trial Law

Maine law has for quite some time been very unfavorable to criminal defendants asserting speedy trial claims. Maine law has routinely required defendants asserting speedy trial claims to show prejudice or "actual prejudice."

In *State v. Drewry*, 2008 ME 76, 946 A.2d 981, the Law Court rejected a speedy trial violation claim asserted by a defendant who was incarcerated for 26 months awaiting a trial. The court described the law applicable to a speedy trial

claim as this:

> A speedy trial analysis requires application of "a delicate balancing test that takes into account all of the circumstances of the case at hand." *State v. Murphy*, 496 A.2d 623, 627 (Me. 1985). We review speedy trial issues according to the four-factor test set forth by the United States Supreme Court: "the length of the delay, the reasons for the delay, the defendant's assertion of his right, and prejudice to the defendant arising out of the delay." *Id.; see Barker v. Wingo*, 407 U.S. 514, 530. We have held that this analysis need only be undertaken when the delay is presumptively prejudicial. *Murphy*, 496 A.2d at 627. If the Court determines that a defendant's speedy trial right has been violated, the proper remedy is dismissal of the indictment. *Barker*, 407 U.S. at 522.

Id. at ¶12. After that statement of the law, the court in *Drewry* went on to hold (1) that a 26 month delay was long but not a *per se* denial of a speedy trial, (2) that most of the delay was caused by the defendant himself changing lawyers and filing multiple pre-trial motions that required hearings, (3) that there was no deliberate attempt to hamper the defendant's defense, (4) that the defendant delayed filing his speedy trial motion until just four days before his trial was scheduled to start, and (5) that the defendant "did not establish that he was prejudiced by the delay in bringing his case to trial."

In *State v. Hofland*, 2012 ME 129, 58 A.3d 1023, the Law Court rejected the speedy trial claim of a defendant who was incarcerated over two years before his trial. The court noted that although the defendant timely first asserted his speedy trial right about six months after he was indicted, the defendant, who at times represented himself, filed "well over 100 motions" prior to the trial and was therefore "the primary reason for the delay." Also, as in *Drewry*, the defendant "failed to demonstrate any prejudice from the delay." *Id*. at ¶12.

In a case that is perhaps the "high water mark" for Maine's prejudice requirement, in *State v. Willoughby*, 507 A.2d 1060 (Me. 1986), the court rejected a speedy trial claim based on a pretrial delay of 14 months because even though (a) that amount of delay was "presumptively prejudicial," and (b) the defendant had "timely and consistently asserted his right to a speedy trial," nevertheless (1) most of the delay was not attributable to the State, and (2) the defendant made no showing of any "actual prejudice." In this case, the requirement of a showing of actual prejudice was crucial. As to the assessment of prejudice, the court set this standard: "We have evaluated any prejudice to an accused in light of the following three interests that the speedy trial right is designed to protect: 1) to prevent undue and oppressive incarceration prior to trial; 2) to minimize anxiety and concern to the accused accompanying public accusation; and 3) to limit the possibility the defense will be impaired."

In many other Maine speedy trial cases defendants' claims have been rejected because "no showing of any prejudice" was made. *State v. Murphy*, 496 A.2d 623 (Me. 1985)(25 months delay but no showing of any prejudice); *State v. Carisio*, 552 A.2d 23 (Me. 1988)(16 months delay but no showing of any prejudice); *State v. Hider*, 1998 ME 203, 715 A.2d 942 (19 month delay but no showing of prejudice).

The Appellant respectfully suggests and requests that the prejudice

requirement be eliminated from Maine speedy trial law so that the law more accurately reflects the actual wording, and apparent purpose, of Article I, Section 6. Criminal prosecutions and trials are supposed to be ***both*** *speedy and fair, not just fair*. If a delay is presumptively prejudicial, the three other factors of the *Drewry* case (the length of the delay, the reasons for the delay, and the defendant's assertion of his right) may still be used to assess the defendant's claim, but no showing of actual prejudice should be required.

So, if Maine speedy trial law is reformed as suggested, then in this case a remand to the UCD court would allow the court to apply this new Maine speedy trial law to Winchester's petitions.

POINT II

The Petitioner's Appellate Attorney Should Have Asserted the Petitioner's Speedy Trial Violation Claims in the Appeal

Petitioner Winchester's claims of speedy trial violations were mentioned in his cases throughout his trial, appeal, and PCR proceedings. 06/08/2021 Evidentiary Hearing at 11-20. In April, 2015, Winchester asked if his attorney had filed any speedy trial motions in his cases. A. 153. In December, 2017, when Winchester entered his various conditional no contest pleas, he ***expressly preserved for appeal his speedy trial violation claims***. A. 33. Winchester discussed his speedy trial claims with his appellate attorney (John Tebbetts) more than once. 06/08/2021 Evidentiary Hearing at 17-20. But his appellate attorney did not pursue those speedy trial violation claims in the appeal, which caused this Court to state in footnote 4 of its decision:

> Winchester did not present any developed argument concerning his lack of a speedy trial to the trial court or in his briefing to this court. Thus, Winchester is deemed to have abandoned this issue on appeal.

2018 ME 142, ¶12 n. 4, 195 A.3d 506, 509 n.4. Obviously, Appellant Winchester himself never intentionally or knowingly abandoned his speedy trial claims. And he certainly never authorized his appellate attorney to abandon his speedy trial claims. The lack of any speedy trial motions in the UCD court might well have presented challenges to the assertion of speedy trial claims on appeal, but such appellate speedy trial claims would not have been frivolous and should have been

asserted.

Winchester's speedy trial claims, if successful, would have provided to Winchester a complete defense to at least some of the charges asserted against him. As a matter of law, the failure to assert Winchester's speedy trial claims on appeal was presumptively ineffective assistance of counsel. *Garza v. Idaho*, 586 U.S. __ (2019)(defense counsel's failure to file a notice of appeal requested by a defendant was ineffective assistance of counsel *even though the defendant had pleaded guilty and signed appeal waivers* and otherwise had poor prospects for an appeal; "poor prospects" are not "no prospects"). The whole point of the *Garza* decision is that an appellate attorney's opinion that an appeal or appeal argument may not be valid is not a justification to completely forego the appeal or appeal argument in the face of a criminal defendant's non-frivolous request that the attorney proceed with the appeal or appeal argument. Certainly, there was no "downside risk" to Winchester in the assertion of speedy trial claims in the appeal. And certainly many of his criminal cases had been pending for over three years (a "presumptively prejudicial" period of time) before they were resolved with his final pleas. The PCR court's denial of this claim of ineffective assistance of appellate counsel was error.

POINT III

THE SIXTH AMENDMENT AND FEDERAL LAW

A. The Sixth Amendment

The Sixth Amendment to the U.S. Constitution provides in relevant part, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .” The leading U.S. Supreme Court speedy trial case is *Barker v. Wingo*, 407 U.S. 514 (1972). In that case a defendant indicted in September, 1958, was, after 16 continuances requested by the prosecution (to only one or two of which the defendant objected), finally tried in October, 1963. After an extensive discussion of the nature and extent of the speedy trial right and the adoption and application to the facts of the case of a "balancing test," the Court rejected the defendant's speedy trial claim. The Court adopted a so-called “four factor” balancing test:

> "A balancing test necessarily compels courts to approach speedy trial cases on an *ad hoc* basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id*. at 530. "We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process." *Id*. at 533.

Unfortunately, the problem with this federal speedy trial law is that it mixes together and confuses the right to a *speedy* trial and the right to a *fair* trial. Those are two different rights. The federal constitutional right is expressed as a right to

"a speedy and public trial, by an impartial jury." The Maine Constitution states: "In all criminal prosecutions, the accused shall have a right to . . . have a speedy, public *and* impartial trial." (italics added). Under this language, the right to a speedy trial is *in addition to* the right to an impartial trial. So, requiring a speedy trial claimant to demonstrate prejudice is an error that has, in effect, watered down the speedy trial right to simply a right to a fair trial. The "speedy" requirement has vanished. Under federal law, a long delay in a criminal prosecution may work a great hardship on a criminal defendant and undermine the public's confidence in our criminal justice system, but unless the defendant can prove the delay actually caused prejudice to the defendant's trial right, no speedy trial dismissal will be warranted. *But see Doggett v. United States*, 505 U.S. 647, 655-656 (1992)(8+ year delay; no showing of actual prejudice required; "Thus, we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify."). This is why the Appellant in this appeal has not pursued any Sixth Amendment claim.

The solution to the excessive weakening of the Sixth Amendment speedy trial right is to eliminate one of the four balancing factors of a speedy trial claim: the "prejudice requirement." In a very different area of federal law, the U.S. Supreme Court recently (on May 23, 2022) eliminated the prejudice requirement of federal arbitration waiver law. *Morgan v. Sundance, Inc.*, 596 U.S. __ (2022).

That's what the U.S. Supreme Court needs to do with Sixth Amendment Speedy Trial law: eliminate the prejudice requirement. That has to be done by the U.S. Supreme Court, however, not this Court. Until that is done, the written constitutional "Speedy Trial" right sounds good but is practically meaningless.

B. The Federal Speedy Trial Act of 1974

Fortunately for criminal defendants in the federal system, the Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-3174, puts some "teeth" into the otherwise nearly meaningless constitutional speedy trial right. In recent years, virtually all speedy trial litigation in federal criminal cases arises under and involves the Speedy Trial Act of 1974, *not* the Sixth Amendment.

But Maine does not have any similar Speedy Trial Act, so the speedy trial rights of Maine criminal defendants are left to Maine courts' interpretations and applications of Article I, Section 6 of the Maine Constitution.

Conclusion

The Appellant respectfully requests that this Court clarify that under Maine law an incarcerated inmate has a speedy trial right under Article I, Section 6 of the Maine Constitution, which provides in part: "In all criminal prosecutions, the accused shall have a right to . . . have a speedy, public and impartial trial." That provision makes no exception for incarcerated inmates. Indeed, incarcerated and sentenced inmates facing charges in new or other cases may need speedy trials *more* than unincarcerated defendants. Simply put, the phrase "all criminal prosecutions" includes criminal prosecutions against incarcerated inmates. An attorney representing an incarcerated inmate in a delayed or much delayed pending criminal case should always assert a speedy trial violation claim in a motion to dismiss filed under M.R.U. Crim. P. 12(b)(1). That is what an ordinary fallible attorney would routinely do in such circumstances.

The Appellant also respectfully requests that this Court clarify that there is no "prejudice requirement" for a violation of the speedy trial right of Article I, Section 6 of the Maine Constitution. A criminal defendant may prove a speedy trial violation without proving that the defendant has been prejudiced by the delay in the defendant's criminal prosecution, because the right to a "speedy" trial is separate and distinct and in addition to the right to an "impartial" trial.

Finally, Appellant Dennis Winchester respectfully requests that this Court

vacate the UCD Court's denial of the Appellant's Petitions for Post-Conviction Review and remand this matter for further proceedings on said Petitions in the UCD Court.

Dated: June 28, 2022

/s/ Lawrence C. Winger

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Certificate of Service

The undersigned Lawrence C. Winger, Esq. hereby certifies that service of a filing was made as follows:

Filing: Appellant's Brief

Served on: DA Todd Collins (by Email & 2 copies U.S. Mail)
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Date of Service: June 28, 2022

Dated at Portland, Maine, June 28, 2022

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